

1-3-2017

State v. Miller Appellant's Reply Brief Dckt. 44200

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	DOCKET NO. 44200
)	
Respondent,)	Bonner County
)	Case No.: CR-2015-06115
vs.)	
)	
GREGORY CLARK MILLER,)	
)	
Appellant.)	
_____)	

APPELLANT'S REPLY BRIEF

APPEALED FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR BONNER COUNTY

HONORABLE BARBARA BUCHANAN
District Judge

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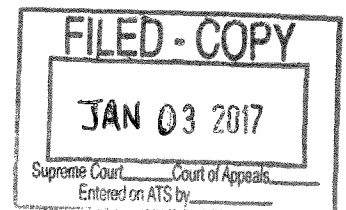


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I. STATEMENT OF THE CASE

A. Statement of Facts

Respondent's Brief states "Miller repeatedly touched the genitals of two eight-year-old granddaughters." (PSI, pp.3-4.)

A review of those pages of the Presentence Investigation does not support the State's contention of "repeated" contact. The Presentence Investigation indicates an isolated incident with two (2) granddaughters. (PSI, pp.3-4 and attachment pp.3-4)

The Respondent's Brief also alludes to the District Court having considered mitigating factors such as Mr. Miller's lack of a criminal record, but appropriately dismissing that factor because "such sex crimes are often hidden". (Respondent's Brief, p.5.)

Respondent seems intent upon exaggerating the criminal acts and suggesting additional conduct that is not reflected in the record.

It appears that the Respondent falls into the same error that the trial court did in assuming Mr. Miller had previously committed other sex offenses with other children, which permits the Court to disregard the mitigating factor of his lack of a criminal record and prompt action in taking accountability.

There is no evidence of any other crimes or offenses in the case or beyond those which form the basis for the two (2) charges. It was error for the court, and now for the Respondent to assert otherwise in an attempt to justify an excessive sentence.

For the reasons set forth herein, the Court is asked to reverse the trial court's sentencing and remand with instructions.

II. ARGUMENT

A. Appellant correctly cited the case law in Appellant's Opening Brief and a basis for this Court to reverse and remand the trial court.

Respondent's Brief relies heavily upon Respondent's assertion that "Miller's argument is without merit, primarily because it relies upon a fabricated quote as its legal standard."

(Respondent's Brief, p.3.) Respondent several times refers to Appellant as "fabricating" a legal standard in Appellant's Brief. Respondent's position appears to be premised upon two (2) false assumptions:

1. That Appellant Miller misquoted the case law from Gregg v. Georgia, 428 U.S. 153, 183 (1976); and
2. That Appellant Miller's argument paraphrasing the holding of Gregg v. Georgia creates a misstatement of the law. Appellant will address each of these in turn.

First, Appellant did not misquote the case law. Beginning at page 9 of Appellant's Brief, the Appellant stated as follows:

"The Idaho Supreme Court in Landreth quoted the U.S. Supreme Court as follows: 'Retribution is no longer the dominant objective of the criminal law ... but neither is it a forbidden objective, nor one inconsistent with our respect for the dignity of men.' State v. Landreth, *supra*; quoting Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 2930, 49 L.Ed.2d 859, ____ (1976)."

Appellant's Brief also correctly quoted the Idaho Court of Appeals' holding in State v. Landreth, that "our courts have recognized four objectives in criminal punishments", which include protection of society, deterrence, rehabilitation, and punishment or retribution. The holding of the Court in Landreth is that retribution is a single factor out of four (4) to be considered and one which embodies "a vindication of society's interest in condemning criminal conduct". (Appellant's Brief, pp.9-10.)

Respondent's Brief chooses to focus upon the argument of Appellant found at page 12 that retribution is not to be the dominant objective rather than Appellant's correct and accurate quote of the case law.

First, the portion of Appellant's Brief found at page 12 was not intended, nor is it cited, as a quote of the law since the Landreth decision and its inclusion of Gregg v. Georgia is directly quoted at pages 9 and 10 of Appellant's Brief.

Second, Respondent argues that "by changing 'no longer' to 'not to be', Miller's counsel substantively changed the meaning of the quote." (Respondent's Brief, p.6.) Respondent fails to support the argument that the change from "no longer" to "not to be" is a substantive change in the law.

The phrase "no longer" is found within the quote from Landreth, and was quoted in Appellant's Brief, page 9. It is a reference to a prospective past law when change of retribution (apparently) was the dominant objective.

By contrast, Appellant argued at page 12 of Appellant's Brief that, since Landreth (1990) retribution is not to be (prospectively) the primary or dominant objective of criminal law sentencing in Idaho. The phrase "not to be" is future tense and is consistent with the quote of Landreth that the criminal court's objective is no longer one dominated only by retribution.

In short, the Respondent's assertion that the change is substantive is simply false. Appellant's use of language is consistent with current Idaho criminal law. Since the holding of Landreth, Appellant's argument is accurate as found at page 12 of Appellant's Brief. The Court is to approach sentencing in a balanced manner considering all four (4) factors, rather than simply emphasizing the objective of retribution or punishment.

The Respondent's Brief is both misleading and misstates Appellant's arguments. Moreover, Respondent provides no substantiation or support for their argument that the case law as quoted in Appellant's Brief is in error.

The Court of Appeals in Landreth went on to state as follows: "We note, however, that the primary consideration is the good order and protection of society, and all other factors must be subservient to that end." State v. Landreth, 118 Idaho 613, 616, 798 P.2d 458, 461 (App.1990).

In Gregg v. Georgia, the U.S. Supreme Court addressed the role of the death penalty fulfilling these purposes of sentencing in a capital crime.

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." Gregg v. Georgia, 428 U.S. 153, 184, 96 S.Ct. 2909, _____ 49 L.Ed. 2d 859, _____ (1976).

The U.S. Supreme Court went on that "instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of society governed by law."

The courts must balance this human need for retribution in the administration of criminal justice with the statement "retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective, nor one inconsistent with our respect for the dignity of man." Gregg v. Georgia, *supra*; quoting Williams v. New York, 337 U.S. 241, 248, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337 (1949).

As set forth in Appellant's opening Brief, the District Court imposed a disproportionate emphasis upon retribution by dismissing all mitigating factors including a Presentence Investigation recommending probation, Mr. Miller's lack of criminal record, and his forthrightness and taking accountability. The District Court further assumed that the basis for these factors being inconsequential was that "all" sexual abuse crimes occur in private, thereby implying that Mr. Miller must also be guilty of additional similar offenses not disclosed or investigated in this proceeding.

The Respondent's Brief falls into that same trap of making assumptions about Mr. Miller's history where no fact exists in the record to support the assumption and thereafter using these false assumptions to justify the inappropriate sentence imposed.

For the reasons set forth above, the trial court's sentencing and Judgment must be reversed and remanded with instructions.

B. The Respondent's Brief incorrectly cites the factors to be considered in sentencing.

Beginning at page 7 of Respondent's Brief, they argue that the law does not support Miller's argument. It has never been Miller's position that it is an inappropriate factor, just simply that the District Court placed all (or most) of its emphasis upon retribution, while dismissing the other factors without a basis.

Respondent mistakenly argues that there are only three (3) principle rationales in sentencing: rehabilitation, deterrence and retribution, citing Hall v. Florida, 134 S.Ct. 1986, 1992 (2014). This misstates the factors to be considered in sentencing under well-established Idaho case law. Whether reviewing State v. Toohill, 103 Idaho 565, 650 P.2d 707 (App.1982), or State v. Landreth, supra, it is clear that the law is as follows:

In Idaho our courts have recognized four objectives in criminal punishment: (1) protection of society (2) deterrence of the individual and the general public, generally (3) rehabilitation of the defendant and (4) punishment or retribution for wrongdoing.

State v. Landreth, 118 Idaho 613, 616, 798 P.2d 458, 461 (App.1990) [emphasis added]; Citing State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978); citing State v. Toohill, 103 Idaho 565, 567, 650 P.2d 707, 709 (App.1982)

Respondent asserts that the mitigating factors of Mr. Miller's acceptance of responsibility and voluntary participation in counseling and lack of a criminal record is offset by the perception that he only entered counseling and took responsibility after being confronted by family members.

As set forth in the Appellant's opening Brief, the Court disregarded a tremendous volume of evidence in the Presentence Investigation indicating Mr. Miller was at extraordinarily low risk to recidivate while being an exceptional candidate for probation.

Notably, the Respondent does not address this issue in their Brief or the Court's decision to disregard the facts and evidence set forth in the Presentence Investigation and which led to the investigator's recommendation of probation.

Ultimately, Respondent argues that the seriousness of the crime and the harm caused by it justified the Court's emphasis on retribution rather than the other three factors of sentencing set forth in Landreth and Toohill. Respondent (as with the District Court) dismisses the first three (3) factors (protection of society, deterrence and rehabilitation) in favor of only imposing punishment or retribution

While the Appellant certainly would not argue that the crime was insignificant or not serious in nature, this case does beg the question of when and why a defendant would, or should, take immediate responsibility and attempt quick rehabilitation or counseling measures if the

Court will simply disregard those efforts as inconsequential or, perhaps, insincere in favor of imposing a retributive sentence of incarceration. In this case, Mr. Miller attempted to take steps to be rehabilitated and be accountable, which is reflected in the prosecutor's and the Presentence Investigator's recommendations of probation.

Without debating the degree of offense that occurred here, it is problematic that both the Respondent and the District Court feel it is appropriate for any sex offense or criminal act to be treated differently than other criminal acts when considering the defendant's role in taking responsibility and attempting rehabilitation. Under the Respondent's and District Court's analysis, a defendant is ill advised to take such responsibility or rehabilitation measures since it will not be considered in the court's sentencing and court's factors toward criminal sentencing.

For the reasons set forth above, the District Court erred, and the Respondent incorrectly argued otherwise, this Court is asked to reverse and remand the matter with instructions for the Court to place Mr. Miller on probation.

C. The District Court erred in denying Mr. Miller Rule 35 Motion.

In response to the Respondent's Brief, the Appellant chooses not to cite any new case law. It is correct that a Rule 35 Motion may either be based upon new evidence or a plea of leniency. In this case, Appellant Miller asserted to the trial court on his Rule 35 Motion that the sentence, as imposed, was an abuse of discretion because it failed to take into account the factors set forth in Toohill and Landreth as discussed above.

For the reasons set forth above, the trial court erred in its sentencing and erred in denying Miller's Rule 35 Motion.

This Court is asked to reverse the trial court's Judgment and sentence and remand with instruction.

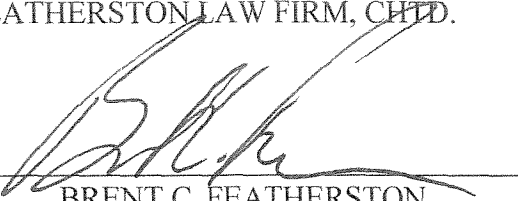
III. CONCLUSION

The Appellant respectfully requests this Court reverse the trial court's sentence of Judgment and denial of the Rule 35 Motion and remand the matter with instruction to sentence Mr. Miller according to the factors set forth in Idaho case law and to thereby impose a sentence of probation.

RESPECTFULLY SUBMITTED this 29th day of December, 2016.

FEATHERSTON LAW FIRM, CHD.

By


BRENT C. FEATHERSTON
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of December, 2016, I caused a true and correct copy of the foregoing document to be served upon the following persons in the following manner:

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By

